SUPREME COURT
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In The

Supreme Court of the United States

OCTOBER TERM, 1961
No. 354

THE COUNTY OF LOS ANGELES and the CITY OF LOS ANGELES,

Petitioners,

vs.

SCANDINAVIAN AIRLINES SYSTEM, INC.

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR RESPONDENT IN OPPOSITION.

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In The

Supreme Court of the United States

October Term, 1961

No. 354

The County of Los Angeles and the City of Los Angeles,

Petitioners,

vs.

Scandinavian Airlines System, Inc.

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Supreme Court of the State of California, the concurring opinion and the dissenting opinion (App. A of Petition) are reported at 56 Adv. Cal. 1, and 363 P. 2d 25.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented.

The initial question presented is whether the decision below rests upon an independent and adequate nonfederal ground.

If the Court finds that no independent and adequate nonfederal ground exists, then the question is whether

the County and City of Los Angeles are prohibited by the Constitution of the United States from levying an apportioned *ad valorem* property tax on aircraft based and registered in a foreign country and flying exclusively in foreign commerce.

A third question is whether the subject tax is prohibited by reason of the various treaties and federal regulations which are set forth in Appendix A to this brief.

Constitutional Provisions, Treaties, Executive Agreements and Statutes Involved.

The provisions of the Constitution of the United States of America involved in this litigation are Article I, Section 8, Clause 3 (Commerce Clause); Article I, Section 10, Clause 2 (Import-Export Clause); Article I, Section 10, Clause 3 (Duty of Tonnage Clause); and the Due Process Clause of the Fourteenth Amendment to the Constitution.

The federal statutes, treaties and executive agreements involved in this litigation are listed in Appendix A hereto.[1]

Statement.

Since November, 1954, respondent has operated an air service between Copenhagen and Los Angeles. For the period relevant to this litigation, this service involved the use of thirteen aircraft owned and operated by

[1]Petitioners, on page 5 of the Petition, list provisions of the California Constitution and the California Revenue and Taxation Code, which were cited in reply to a contention made by respondent upon which the Supreme Court of California expressly refrained from making any decision (see 50 Adv. Cal. at 31; Pet. App. A at 46). Accordingly, the various references to California law contained on page 5 of the Petition are irrelevant to the proceedings before this Court.

Scandinavian Airlines System (hereinafter referred to as "SAS"), and consisted of two flights per week.

The average value of the thirteen aircraft was about $950,000. The computation of tax was based on the assumption that the thirteen aircraft made 104 flights annually, an average of eight flights apiece. Each of the aircraft was based in one of the three Scandinavian countries—Denmark, Norway or Sweden—with a registered home port of Copenhagen, Oslo or Stockholm. The operations of each of the aircraft were taxed on an unapportioned basis in the country in which it was registered.

Petitioners, for the year 1955-1956, assessed and collected a personal property tax in the amount of $11,240.40 upon the SAS aircraft. The tax was levied on that percentage of the total value of the aircraft equal to the assumed hours spent in Los Angeles County[2] divided by the total hours in the year. Respondent brought this action for a refund. The trial court rendered judgment for respondent, which was affirmed by the Supreme Court of the State of California on May 29, 1961.

The California Supreme Court relied largely upon three factual considerations: first, that instrumentalities of foreign commerce have not been subjected to taxation except in their "home port" in any other state of the Union or in any other country; second, that this internationally accepted practice has been followed

[2]The formula of apportionment included time spent on the ground, as well as a period of one hour flying time for each flight in and out of Los Angeles. In oral argument before the Supreme Court of California, however, counsel for petitioners conceded that the apportionment formula could not properly include flying time.

since the Nineteenth Century and is still being followed in California with respect to foreign-based vessels; and third, that foreign-based vessels have essentially the same contact with the major California seaports as SAS aircraft have with Los Angeles airport: the major seaports are visited on regular schedules by foreign-based passenger liners and freighters.

A further consideration, which was not referred to in the opinion below, but which was relied on by counsel for respondent in its brief[3] and in oral argument,[4] is that no part of the tax in question was used to support the airport facilities in Los Angeles.[5] SAS, by means of landing fees and rentals, paid in full for the actual benefits obtained from its use of Los Angeles International Airport.[6]

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[3]Pages 26-27 of Petition for Hearing filed by respondent in the Supreme Court of California.

[4]Pages 12-13 of Reporter's Transcript of Oral Argument in the Supreme Court of California.

[5]Los Angeles International Airport is operated as a completely independent, self-sustaining organization by the Department of Airports of the City of Los Angeles. No part of its revenues come from property taxes or from any other form of taxation. Forty percent of its total revenue for 1958-1959, for example, was received from those airlines using the airport, in the form of ground rentals, flight fees, landing fees and similar charges. The balance of the airport's income came from concessions (such as the restaurants and auto parks). See *Annual Report, Department of Airports, City of Los Angeles*, 1959.

[6]For the month of July, 1960, a typical month, SAS paid $3,293.00 to the Department of Airports in the form of landing fees and rentals. Page 27 of Petition for Hearing filed by respondent in Supreme Court of California.

ARGUMENT.

I.

The Judgment Below Is Based on an Independent and Adequate Nonfederal Ground.

The basic premises of the opinion and judgment below are (i) that for purposes of California's property tax, foreign-based aircraft entering California airports on regular schedules in the course of foreign commerce cannot be distinguished from foreign-based vessels which similarly enter California seaports on regular schedules in the course of foreign commerce; and (ii) that the application of the home-port doctrine to vessels based in foreign countries has been adhered to in California and elsewhere for so long a period that it has become "definitely settled" (50 Adv. Cal. at 10; Pet. App. A at 10) as a principle of taxation.

The first premise is clearly not predicated upon federal grounds. The California Supreme Court held that for purposes of California's property tax, instrumentalities of foreign commerce must be treated alike, "[w]hether they be sailing vessels, steamships or airplanes. . . ." (50 Adv. Cal. at 23; Pet. App. A at 32).[7] The court neither cited nor relied upon federal precedent for its conclusion. The court observed:

> ". . . [E]ach of our major seaports is visited regularly by passenger liners and freighters, operating on regular schedules, in the same man

[7] The taxation in question is predicated by petitioners entirely on the following provision of the California Constitution, which has remained substantially unchanged since 1861 (See Cal. Stats. 1861, at 420-22):

> "All property in the State . . . not exempt under the laws of the United States shall be taxed in proportion to its value . . ." (Pet. p. 5.)

> ner in which [respondent's] airplanes visit Los Angeles International Airport." (50 Adv. Cal. at 31; Pet. App. A at 40.)

Since the refusal of the California Supreme Court to permit the distinction is a decision not based on federal grounds, it is within the province of that court.

The second premise is likewise grounded on considerations of California law. In argument before the court below, counsel for respondent stressed the fact that the application of the home-port doctrine had been adopted as part of the common law of California.[8] The contention has its origin in *Hays v. Pacific Mail S.S. Co.*, 58 U. S. (17 How.) 596 (1855), where this Court ruled that the application of the home-port doctrine to foreign-based vessels is required by the law of California.[9]

The court below accepted this contention. Its decision paid particular attention to the fact that the "basic principles" of the home-port doctrine had been enunciated in prior California cases (50 Adv. Cal. at 10; Pet. App. A at 10-11). The court cited four California cases, decided in 1883, 1905, 1907, and 1943, all of which were based on nonfederal grounds.[10] (50 Adv. Cal. at 12; Pet. App. A at 14).

[8] "Mr. Hills: Apart from the constitutional issue involved in this case we contend that the home-port doctrine has been adopted as part of the common law of this State and that it must be followed by the defendants in their taxation of aircraft and vessels engaged in foreign commerce." [Rep. Tr. of Oral Argument in the Supreme Court of the State of California, p. 21; see also p. 7.]

[9] The *Hays* decision "rested . . . on an interpretation of state law and on common-law concepts of jurisdiction to tax." Note, *State Taxation of International Air Transportation*, 11 Stan. L. Rev. 518, 522 n. 19 (hereinafter cited "11 Stan. L. Rev. at").

[10] *City and County of San Francisco v. Talbot*, 63 Cal. 485, 488-89 (1883); *Olson v. City and County of San Francisco*, 148 Cal.

The court below did note that the principles of the home-port doctrine have been adopted with respect to instrumentalities of foreign commerce by decisions of this Court interpreting the Constitution of the United States. From a review of these decisions, the court found an "inference that, should the United States Supreme Court be presented with a situation involving airplanes engaged in foreign commerce," (56 Adv. Cal. at 18; Pet. App. A at 23-24) it would apply the home-port doctrine.

However, the conclusion of the court was not limited to considerations of federal law:

> "The question is, should the 'home-port' doctrine, *as a matter of principle*, be applied to the facts of the instant case?
>
> "We think that that doctrine should be so applied." [Emphasis added.] (56 Adv. Cal. at 21; Pet. App. A at 29.)

If the opinion below is read in its entirety, it is apparent that the conclusion is based upon independent and adequate nonfederal grounds. The court stated:

> ". . . [I]t is our duty to determine what 'settled legal principles,' if any, are applicable to the tax here under consideration. If that determination leads to the conclusion that the 'home-port' doctrine is applicable herein it is our duty to so declare, not only because the United States Supreme Court has spoken with finality in a field which is

80, 82-83 (1905); *California Shipping Co. v. City and County of San Francisco*, 150 Cal. 145, 88 Pac. 704 (1907); *Sayles v. County of Los Angeles*, 59 Cal. App. 2d 295, 138 P. 2d 708 (1943). See also *Pacific Air Transport v. Superior Court of San Diego*, 93 Cal. App. 2d 522, 525, 209 P. 2d 143, 145 (1949).

> peculiarly federal in nature, but *because such principles have been definitely settled, and should not be overruled except for most compelling reasons* which do not here exist. It should also be noted that *the basic principles which will determine the applicability or inapplicability of the 'home-port' doctrine have been enunciated by this court* as well as by the United States Supreme Court." [Emphasis added.] (56 Adv. Cal. at 10; Pet. App. A at 10-11.)

In the concluding paragraph of its opinion, the court again emphasized the fact that its judgment was not placed exclusively upon federal grounds:

> ". . . [N]o state has ever attempted to tax foreign instrumentalities of commerce arriving within its jurisdiction solely in foreign trade. If, during the 185 years of existence of the United States such property has been assumed to be nontaxable, *it makes little difference whether that belief stemmed from constitutional prohibitions or from considerations of policy.*" [Emphasis added.] (56 Adv. Cal. at 32; Pet. App. A at 47.)

The court's unwillingness to overturn a "definitely settled" principle of the common law of California provides an adequate and independent nonfederal ground for the judgment below. On four previous occasions California courts, following the lead of this Court in the *Hays* case, have adhered to the home-port doctrine without giving it a federal basis. The use of the same common-law principle in the decision below should cause this Court to deny the Petition.

There is some parallel between the decision of the Supreme Court of California in this case and its de-

cision in *Black v. Cutter Laboratories*, 43 Cal. 2d 788, 278 P. 2d 905 (1955).[11] This Court dismissed a petition for a writ of *certiorari* to review that decision on the ground that it rested on adequate state grounds. *Black v. Cutter Laboratories*, 351 U. S. 292 (1956). This Court said:

> "This Court . . . reviews judgments, not statements in opinions. . . . [I]t is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds." 351 U. S. at 297-98.
>
> * * * *
>
> "Moreover, even if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a constitutional question." 351 U. S. at 299.

Petitioners incorrectly state on page 6 of the Petition that the California Supreme Court "explicitly disavowed decision herein upon state grounds." The court stated only that: "We expressly refrain from any decision upon [respondent's] contention that neither the California Constitution nor any statutory provision provides a basis for the instant tax."[12] (56 Adv. Cal. at 31; Pet. App. A at 46.) The court ob-

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[11]See *Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 54-55 (1934); see also, Note, *The Untenable Nonfederal Ground in the Supreme Court*, 71 Harv. L. Rev. 1375, 1380-83 (1961).

[12]This contention is described in the opinion below (56 Adv. Cal. at 8-9; Pet. App. A at 7-9). See also page 14, *infra*.

viously did not by this statement refrain from deciding the entirely unrelated argument that the home-port doctrine is predicated upon principles of the common law of California.

II.

The Application of the "Home-Port" Doctrine to Instrumentalities of Foreign Commerce Should Not Be Reviewed by This Court.

Petitioners state that this "case is of considerable importance nationally." (Pet. at 5.) In fact, the case has international significance; but this consideration does not support the Petition. By challenging the validity of a heretofore internationally accepted principle of taxation, petitioners have aroused concern and antagonism in a number of foreign countries.[13] Any case involving the possibility of overturning a doctrine so widely accepted would necessarily arouse such interest. The fact that the case is of considerable concern to a number of foreign governments, however, is no reason to review a decision which, if left undisturbed, would eliminate their concern.

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[13]Most of the foreign-based carriers serving California filed briefs in the Supreme Court of California (56 Adv. Cal. at 7; Pet. App. A at 6) in support of the position of SAS, and several foreign countries, particularly Japan, have threatened to pass laws which would levy retaliatory property taxes upon American-based air carriers if the Los Angeles tax is upheld. Such a law has already been enacted by West Germany. Lufthansa, an air carrier based in West Germany, now services San Francisco. See 11 Stan. L. Rev. at 519 nn. 10-11. The court below surmised that if the home-port doctrine for foreign-based instrumentalities was abandoned, "The repercussions would be world-wide. Retaliatory taxation would be inevitable." (56 Adv. Cal. at 32; Pet. App. A at 47.) The granting of the Petition would itself prolong the concern and increase the antagonism which have been caused by petitioners' action.

A. The Federal Question Involved Is Not Ripe for Review.

There is nothing unique in the decision below. The California Supreme Court adhered to a premise that has been recognized throughout the world and by prior decisions of this Court. There is no conflict among the courts as to the principle involved. Editorial comment entirely supports the decision below,[11] and the principle applied has been endorsed by the Civil Aeronautics Board, which approved apportioned taxation of interstate air carriers, but stated:

> "[I]nternational air carriers should be subject to the exclusive tax jurisdiction of the country in which the carrier is organized and its planes are registered." (*Multiple Taxation of Air Commerce*, H. R. Doc. No. 141, 79th Cong., 1st Sess. (1945) (Letter of Transmittal, page v).)

Although foreign-based aircraft and foreign-based vessels have been entering American ports on regular schedules for many years, no taxing authority in this nation other than petitioners and one other California County has attempted to tax either type of property. Nor is there any indication that other taxing authorities will follow the lead of Los Angeles, even though Los Angeles has been taxing foreign-based aircraft for more than six years. Since California's courts are satisfied as a "matter of principle," and since no other state will be affected by the decision below, the matter is not ripe for review.

[11] See *e.g.*, 11 Stan. L. Rev. at 530-39; and articles cited at note 19, *infra*.

The fact that the reversal of the decision below would cause the immediate erection of retaliatory taxes[15] is further reason for this Court to avoid a hasty resolution of the issues involved.

B. This Case Involves Factual Considerations Which Should Cause This Court to Deny the Petition.

The present case involves factual considerations which may prove to be material to an ultimate decision and which have no significance outside of California.

When the County Assessor of Los Angeles commenced the apportioned taxation of foreign-based aircraft, he continued to apply the home-port doctrine to foreign-based ships. This inconsistency was of obvious significance to the court below, and should be a material factor in causing this Court to deny the Petition.[16] If the continued efficacy of the home-port doctrine's application to foreign commerce is to be reviewed, the review should be of state action which does not discriminate between foreign-based vessels and aircraft.

It is also significant that the proceeds of the tax in question are not used for or measured by the benefits conferred upon foreign-based aircraft at the Los Angeles International Airport (see discussion *supra* at n. 5). The present tax cannot be justified, therefore, on the ground so often used in cases involving the apportioned taxation of vehicles of interstate commerce: that a local government has a right to be paid

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[15]See note 13, *supra*.

[16]Petitioners do not attempt to justify or explain the discrimination, even though they seem to accept the fact that foreign-based ships and aircraft should be treated the same.

for benefits and protections provided. See 11 Stan. L. Rev. at 535.

A third consideration is the fact that the court below expressly reserved judgment on respondent's contention that there is no constitutional or statutory basis under California law for the tax here in question. The court indicated that the argument was substantial.[14] If the home port principle should be abandoned by this Court in a review of the decision below, this Court could not render a final decision. The case would have to be sent back to the Supreme Court of California. If that court then adopted the respondent's statutory argument, as it has indicated it might, this Court would in effect have rendered only an advisory opinion.[15]

C. The Discussion of Applicable Treaties by the Court Below Does Not Furnish Grounds for Review.

In answer to respondent's contention that the federal government has so regulated foreign based aircraft by statute, treaty and executive agreement as to preclude

[14] See description of this contention by Justice Peters (56 Adv. Cal. at 8; Pet. App. A at 7), and his suggestion that the petitioners had inadequately answered the contention (56 Adv. Cal. at 9; Pet. App. A at 9).

[15] This Court should also give consideration to the possible effect [illegible] below (see Appendix B hereto) [illegible] aircraft based in California which are not operated by an "air carrier or foreign air carrier" within the meaning of the Federal Aviation Act. It also provides a fixed tax rate on such aircraft, although [illegible] higher [illegible]

the tax here in issue, the court below found the tax to be prohibited by a treaty between Sweden and the United States (56 Adv. Cal. at 30, Pet. App. A at 43-44). In substance, however, the court used the treaty point merely to bolster its earlier conclusion that the regulation of vehicles of foreign commerce should be left to the federal government:

> "This is but another way of saying, as we said above, that taxation of foreign-owned and based instruments of commerce represents a field that is peculiarly federal in nature . . . and which must be left to the administration of the federal government even in the absence of any federal legislation thereon." (56 Adv. Cal. at 31; Pet. App. A at 45).

Thus, the court's interpretation of the Swedish Treaty has no independent significance and does not furnish grounds for review by this Court.

III.

The Judgment Below Is Correct.

A. The Judgment Below Is Entirely Consistent With Prior Decisions of This Court.

The court below, after reviewing prior decisions of this Court, stated:

> "The language and rationale of the decisions create the inference that, should the United States Supreme Court be presented with a situation involving airplanes engaged in foreign commerce . . . it would apply the same doctrines as it has consistently applied to ocean-going vessels similarly engaged." (56 Adv. Cal. at 18; Pet. App. A at 23-24).

This same observation has been made by several commentators.[19] We submit that it is correct.

The doctrine applied to ocean-going vessels—the so-called "home port doctrine"—was developed in the Nineteenth Century to provide a system of taxation of property which constantly traveled from place to place.[20] Such property was to be taxed as to its entire value by its place of registry, and was not to be taxed at all elsewhere. This approach insured a tax on the full value of the property, but prevented multiple taxation.

Subsequently, this Court refused to extend the home-port doctrine to railroad rolling stock moving in interstate commerce. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (1891). Noting that the application of the home port doctrine would permit rolling stock "to escape taxation . . . by constant movement from one state to another" (141 U. S. at 29), this Court allowed a state to tax a portion of the value of railroad rolling stock, based on the time the property was in the state. The Court was careful to point out that, for purposes of property taxes, vehicles moving on land in interstate commerce are of a vastly different nature than ocean-going vessels:

> "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the state and federal governments. . . . *The vehicles of commerce by water being instruments of inter-*

[19] 11 Stan. L. Rev. at 518; Note, 6 U.C.L.A. L. Rev. at 481, 489; 72 Harv. L. Rev. 1581, 1587 (1959).

[20] See 11 Stan. L. Rev. at 522.

> *communication with other nations*, the regulation of them is assumed by the National Legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible." [Emphasis added.] 141 U. S. at 23-24 (Quoting *Baltimore & O. R. Co. v. Maryland*, 88 U. S. 456, 470 (1875).)

In 1949, this Court held that for purposes of state property taxes, there is "no practical difference between vessels or railroad cars that are moving *in interstate commerce*." [Emphasis added.] *Ott v. Mississippi Barge Line Co.*, 336 U. S. 169. Again the Court was careful to confine its decision to vehicles of interstate commerce:

> "We do not reach the question of taxability of ocean carriage but confine our decision to transportation on inland waters." 336 U. S. at 173-74.[21]

A number of commentators have observed that the *Ott* decision left the home-port doctrine in full effect with respect to ocean-going vessels.[22]

In *Braniff Airways v. Nebraska*, 347 U. S. 590 (1954), counsel for Braniff, relying upon the cases involving ocean-going vessels (347 U. S. at 599), argued

[21] The *Ott* decision overruled by implication earlier decisions of this Court which applied the home-port doctrine to interstate vessels: *cf., St. Louis v. The Ferry Co.*, 78 U. S. 423 (1871). See also 11 Stan. L. Rev. at 522, 529-30.

[22] Note, 28 Ind. L. J. 212, 215 (1952); Note, 9 La. L. Rev. 545, 549 (1949); Note, 13 Okla. L. R. 46, 51 n. 32 (1960); 11 Stan. L. Rev. at 530 n. 41; Note, 6 U. C. L. A. L. Rev. 484, 486 (1959); Note, 1 Wayne L. Rev. 46, 48 n. 19 (1954). The *Ott* case was adhered to in *Standard Oil Co. v. Peck*, 342 U. S. 382 (1952), where the Court was again careful to confine its decision to vessels plying the inland waters. 342 U. S. at 383-84; see 28 Ind. L. J. at 215 n. 15.

that apportioned property taxation of aircraft engaged in interstate commerce was unconstitutional.[28] This Court, however, rejected the analogy, saying:

> "A closer analogy exists *between planes flying interstate and boats that fly the inland waters.* We perceive no logical basis for distinguishing the constitutional power to impose a tax on such aircraft from the power to impose taxes on river boats." [Emphasis added.] 347 U. S. at 600.

Again, the clear implication of the opinion was that the home port doctrine remained unaffected with respect to "instruments of intercommunication with foreign Nations."[29]

To date this Court has permitted the application of two rules to the taxation of instrumentalities of commerce. Vehicles engaged in interstate commerce, whether rolling stock, ships or aircraft, have been taxed on an apportioned basis. A separate rule has governed the taxation of ocean-going vessels: because such vessels are instruments of communication with other nations, they may be taxed only at their home port.

[28] The taxation of aircraft engaged in interstate commerce was also before the Court in [illegible]. There, as in 322 U. S. 292 (1944), but because of the split in the Court, the decision was inconclusive. Nevertheless, the contrast between the taxation of ocean-going vessels and vehicles of interstate commerce was noted. 322 U. S. at 316 (dissenting opinion).

[29] As stated in one court decision:

> "It is arguable from the language of the Court in *Ott* that the aforementioned vessels engaged in foreign commerce [illegible] at 530 n. 11.

[illegible]

Common sense dictates that foreign-based aircraft must be taxed in the same manner as foreign-based vessels. It would be unreasonable to subject SAS aircraft to a property tax for the use of California's airports, and yet permit foreign-based vessels regularly to use California's seaports without paying the same charge. That foreign-based aircraft and vessels are in vigorous competition is sufficient in itself to prohibit such discrimination.

Since foreign aircraft cannot be distinguished from foreign ships, the decision below could not have been otherwise if it was to be consistent with the decisions of this Court.[25]

B. Instrumentalities of Foreign Commerce Cannot Be Taxed in the Same Manner as Instrumentalities of Interstate Commerce.

(1) *The Negative Implications Inherent in the Power of Congress Over Foreign Commerce Are Greater Than Those Inherent in Congressional Power Over Interstate Commerce.*

Although the commerce clause does not distinguish between congressional power over foreign and interstate commerce, this Court has repeatedly indicated that

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[25]The only distinction that has been suggested between foreign-based aircraft and vessels is that the home-port doctrine is somehow connected with the law of admiralty. There is neither logic nor authority for such assertion. The original home-port cases were not based on the law of admiralty. In the *Pullman* case this Court distinguished the taxation of ocean-going vessels from railroad rolling stock on the basis that the former were "instruments of intercommunication with foreign Nations," and on each of the other occasions that this Court has been requested to apply the home-port doctrine to vehicles of interstate commerce, this Court has distinguished the ocean-going vessel cases on the ground that they did not involve interstate commerce. (See opinion below, 58 Adv. Cal. at 25; Pet. App. A at 35-36.)

foreign commerce "is more clearly a matter of national concern,"[26] and that therefore the area left to the states in that field is far more restricted than the residual power of the states in the field of interstate commerce.[27] Considerable evidence supports the view that the framers of the Constitution intended that such a distinction be drawn.[28]

This Court, in the *Pinkman* decision, was particularly explicit in applying this distinction to instrumentalities of commerce:

> "The vehicles of commerce by water being instruments of intercommunication with other nations the regulation of them is assumed by the National Legislature." 141 U. S. at 24.

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[26]See 11 Stan. L. Rev. at 526.

[27]As stated by this Court in *Brown v. Maryland*, 12 Wheat. (U. S.) 419, 448 (1827):

> ". . . [T]he inference to be drawn from the absence of legislation by Congress on the subject excludes state legislation affecting commerce with foreign nations more strongly than that affecting commerce among the States. [In matters] concerning the external relations of the United States with other nations and governments, are general in their nature, and should proceed exclusively from the legislative authority of the nation. . . . The same necessity perhaps does not exist equally in reference to commerce among the States. . . . [I]n respect to commerce among the States . . . the same inference is not always to be drawn. The subjects of congressional legislation are not the same."

Similar statements [illegible] 22 U. S. (9 Wheat.) 1, 228-29 (1824); *Board of Trustees of Univ. of [illegible]* 28 [illegible] *Stanley*, 121 U. S. 71, 73 [illegible] *Pinkman*, 141 U. S. 22, 23 (1891); *Leisy v. Hardin*, 135 U. S. 100, 107 (1890); *Walling v. Michigan*, 116 U. S. 446, 455 (1886); *Welton v. Missouri*, 91 U. S. 275, 279 (1875); *Crandall v. Nevada*, 73 U. S. (6 Wall.) 35, 43 (1867); *Passenger Cases*, 48 U. S. (7 How.) 283, 398 (1849); *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 194 (1824). [illegible]

[28]See [illegible] 11 Stan. L. Rev. at 525 n. 29.

Any burden placed on foreign commerce involves the exterior relations of this country and accordingly, is presumptively more likely to be within the exclusive power of Congress than a similar burden placed on interstate commerce. That aircraft engaged in interstate commerce may be taxed on an apportioned basis is no precedent for permitting similar taxation of foreign-based aircraft engaged exclusively in foreign commerce.

(2) *Apportioned Taxation of Foreign-Based Aircraft Creates a Burden Not Created by Apportioned Taxation of Aircraft Operating Only in the United States.*

This Court, by its control over state taxation of the instrumentalities of interstate commerce, has been able to develop a system of apportioned taxation which, by and large, protects against double taxation and its consequent interference with commerce. Where both the domicile of the owner of aircraft and the other ports in which the aircraft are operated are in the United States, this protection is both possible and practicable. But where aircraft are owned and based in a foreign country, which can levy a tax, the United States Supreme Court cannot exercise the supervision necessary to insure that commerce is not unduly obstructed. The apportionment system does not work in such cases and should not be applied.[29]

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[29] There is a valid distinction from a practical point of view between multiple state taxation and multiple international taxing. It is possible to sponsor a coherent system of restrictions upon double taxation when you control all the claimants who are competing for the tax. Interstate multiple taxation can be regulated by the Supreme Court because it controls all the factors in the problem. On the other hand, in the contest over international double taxation, the Supreme Court is an inadequate arbiter since

A principle basic to the decisions allowing apportioned taxation is that "the rule which permits taxation by two or more states on an apportionment basis precludes taxation of all the property by the state of the domicile." *Standard Oil Co. v. Peck*, 342 U. S. 382, 384 (1952). Under this principle, "there is no risk of multiple taxation." *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174 (1949). To permit apportioned taxation of foreign-based vessels or aircraft would constitute an abandonment of this principle.

It has been suggested that "the root of the evil" is in the foreign countries which adhere to the home port doctrine (see Pet. App. B at 17). It would, however, be practically and politically impossible to require the rest of the world to adopt the taxing policies of Los Angeles.

(3) *Petitioners Are Attempting to Exact a Toll From Respondent for Its Use of the Los Angeles International Airport as a Port of Entry Into the United States.*

Prior to the adoption of the Constitution, advantageously located states taxed ships and goods arriving from foreign countries. The primary purpose of the commerce, import-export, and tonnage clauses was to prevent "coastal states from taking advantage of their natural location to exact such a toll."[39] The major

it can coerce the action of only one of the principals to the controversy, the United States." Lowndes, *Some Constitutional Limitations on the Power to Levy Taxes or Tariffs*, 47 Harv. L. Rev. 425, 434-35 (1934).

[39] 11 Stan. L. Rev. at 534; The Federalist No. 22, at 185-86.

airports of this nation are, like seaports, determined by geographical location. As the court below observed:

> "Whether they be sailing vessels, steamships or airplanes . . . they enter the territory of a given state for the sole purpose of utilizing a port thereof as a port of entry to the United States." (56 Adv. Cal. at 23; Pet. App. A at 32-33).

The application of the "toll principle" by the court below should be upheld to prevent Los Angeles from taking advantage of its location to exact a toll from SAS and other foreign-based aircraft.[31]

The tax here in issue does particular violence to the toll principle because of its lack of relation to the benefits conferred upon SAS aircraft by petitioners.[32]

(4) *The Federal Government Has Pre-empted the Field of Taxation of Foreign-Based Aircraft.*

In the preceding discussion, it has been assumed that Congress has been completely silent in the field of foreign air commerce. In point of fact, however, Congress has so regulated the operation of all foreign-based aircraft as to pre-empt any residual power which the states might otherwise be thought to have in the field (see statutes, treaties and executive agreements set forth in App. A hereto).[33]

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[31]The toll principle has not been restricted in the field of foreign commerce. 11 Stan. L. Rev. at 534; *Ott v. Mississippi Valley Barge Line Co.*, 350 U. S. at 173-74 (dictum).

[32]See note 5, *supra*.

[33]State action is precluded when it is inconsistent with "a policy underlying executive agreements," *United States v. Pink*, 315 U. S. 203, 233 (1942), or where there exists "a comprehensive and integrated scheme of federal regulations." *Pennsylvania v. Nelson*, 350 U. S. 497, 504 (1956).

On at least nineteen separate occasions in the past twenty-five years, the federal government has entered into reciprocal treaties or agreements with one or more of the Scandinavian countries here involved for the purpose of regulating the flight of aircraft between the two nations. Several of these treaties have involved taxation of aircraft.[34] The tax here at issue is inconsistent with the underlying policy of these measures.[35]

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[34]A particular manifestation of the policy of our federal government is the Convention of International Civil Aviation of December 7, 1944 (61 Stat. 1180, TIAS 1591), which provides in Article 15:

> "No fees, dues or other charges shall be imposed by any contracting state in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting state or persons or property thereon."

These provisions do not prohibit the levying of fair charges for the use of local airports facilities, such as landing, user fees and rentals. But the property tax here in issue obviously cannot be defended as a *quid pro quo* for benefits derived from respondent's use of Los Angeles International Airport.

[35]In determining whether a challenged state law is precluded by federal occupation of the field, the Supreme Court has paid particular attention to its impact in the field of international relations:

> ". . . [I]t is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceived imperatively to demand broad national authority." [Footnotes omitted.] *Hines v. Davidowitz*, 312 U. S. 52, 68 (1941).

See also, *Allen-Bradley Local v. Wisconsin Employment Relations Bd.*, 315 U. S. 740, 749 (1942), where the Court stated:

> "We were not ready to conclude that a federal action in a field that touched international relations superseded state regulation."

Conclusion.

For the reasons set forth above, it is respectfully submitted that the Petition should be denied.

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APPENDIX A.

The operations of SAS, as a foreign air carrier, are subject to extensive regulation by the Federal Government of the United States of America. The most pertinent of these regulations are as follows: The Civil Aeronautics Act of 1938, 49 U.S. Code §§ 211.1 211.5 (Permits to Foreign Air Carriers), 221.1 221.248 (Tariffs of Foreign Carriers), 402 (Permits), 403 (Tariffs), 404 (b) (Discrimination in Service), 406 (f) (Air Mail Payments), 501 (Registration), 601 603, 609 610 (Safety Rules and Regulations), 901 903 (Penalties), 1002 (c) (Removal of Discrimination); Civil Air Regulations, 14 Code of Federal Regulations §§ 1.90 1.55 (Type Certificates), 44.0 44.7 (Foreign Air Carrier Regulations), 399.1 399.81 (Transportation of Explosives and Other Dangerous Articles), 60.1 60.60 (Air Traffic Rules), 62.1 62.45 (Notification and Reporting of Aircraft Accidents and Overdue Aircraft), 190.1 190.70 (Navigation of Foreign Aircraft within the United States), Regulations of the Attorney General Under the Immigration and Nationality Act (66 Stat. 163) 8 Code of Federal Regulations §§ 251, 239, 251 253, 280; the Bureau of Customs Regulations, 19 Code of Federal Regulations (Chapter I, Part 6 (Air Commerce Regulations).

The [illegible] agreements entered into by the United States designed to regulate the operations of the Corporation. Bilateral Double Taxation Agreements with the Kingdom of Denmark (January

1, 1948), with the Kingdom of Sweden (January 1, 1940), and with the Kingdom of Norway (January 1, 1951); the International Telecommunication Convention of Buenos Aires (December 22, 1952); Bilateral Air Navigation Agreements with the Kingdom of Sweden (October 9, 1933), with the Kingdom of Norway (October 10, 1933), and with the Kingdom of Denmark (March 24, 1934); Air Transportation Agreements with the Kingdom of Denmark (January 1, 1945), with the Kingdom of Sweden (January 1, 1945), and with the Kingdom of Norway (October 6, 1945); Airworthiness Agreements with the Kingdom of Denmark (December 15, 1954), with the Kingdom of Sweden (December 22, 1954) and with the Kingdom of Norway (October 6, 1933); Pilot License Agreements with the Kingdom of Denmark (March 24, 1934), with the Kingdom of Norway (September 9, 1933), and with the Kingdom of Sweden (September 9, 1933); the Universal Postal Union Convention of Brussels, 1952; the Warsaw Convention, 1929; and the Mortgage Convention (Geneva), 1948; Convention on International Civil Aviation (Chicago) (1944),

APPENDIX B.

An act to add Part 10 commencing with Section 5301 to Division 1 of the Revenue and Taxation Code, relating to the taxation of aircraft.

The people of the State of California do enact as follows:

Section 1. Part 10 commencing with Section 5301 is added to Division 1 of the Revenue and Taxation Code, to read:

PART 10. AIRCRAFT ASSESSMENT AND TAXATION

Chapter 1. General Provisions and Definitions

5301. It is the intent of the Legislature in enacting this part to provide for a uniform countywide system of ad valorem taxation of all aircraft in this State, regardless of where the aircraft is based in the State.

5302. Except where the context otherwise requires, the definitions given in this chapter govern the construction of this part.

5303. (a) "Aircraft" means any contrivance used or designed for the navigation of or for flight in the air which has been flown at least once, other than a parachute or similar emergency safety device.

(b) "Aircraft" does not include any of the following:

(1) Rockets or missiles.

(2) Aircraft operated exclusively by an air carrier or foreign air carrier as defined in subdivisions (3) and (19) of Section 101 of Title I of the Federal Aviation Act of 1958 (P.L. 85-726; 72 Stat. 731) engaged in air transportation as defined in subdivision

(10) of the same section while there is in force a certificate or permit issued by the Civil Aeronautics Board of the United States, or its successor, authorizing such air carrier to engage in such transportation.

5304. "In this State" means within the exterior limits of the State of California, and includes all territory within these limits owned by or ceded to the United States of America.

Chapter 2. Exemptions

5331. Aircraft owned by the United States, by any foreign government, or by a consul or other official representative of any foreign government, are exempt from personal property taxation.

5332. Aircraft owned by this State or by any county, city and county, city, district, political subdivision, public corporation or authority of this State are exempt from personal property taxation.

Chapter 3. Assessment

5362. The assessor of the county in which the aircraft is habitually situated shall assess the aircraft at its market value.

5363. In assessing aircraft, the county assessor shall determine the market value of the aircraft in accordance with standards and guides to the market value of aircraft prescribed by the board. In determining the market value of aircraft the assessor shall not take into account the existence of any custom or common method, if any, in arriving at the market value of any class or classes of aircraft.

5364. The board shall establish standards and fix guides to be used by the county assessor in the assessment of aircraft at market value.

5365. Owners of aircraft shall annually file a property statement, in which is stated the make, model and year of manufacture of the aircraft, with the assessor of the county in which the aircraft is habitually based.

5366. Owners, as well as operators, of private and public airports shall, on or before the first Monday in March of each year, provide the assessor of the county in which the airport is situated with a statement containing a list of names and addresses of the owners of all aircraft which use the airport as a base.

Chapter 4. Levy

5391. On or before September 1, of each year, the board of supervisors of each county shall fix the rate of tax for aircraft, and shall levy the tax on aircraft. The rate shall be equal to one and one-half percent (1.5%) of the market value of the aircraft as determined pursuant to this part. If the board of supervisors of any county for any reason fails to fix the rate of tax for aircraft, the rate of tax for aircraft shall be conclusively presumed to be one and one-half percent (1.5%) of the market value of the aircraft as determined pursuant to this part.

5392. The tax levied pursuant to this part is in lieu of all other local property taxes on aircraft.

Ad valorem taxes on aircraft not subject to this part but otherwise subject to ad valorem taxation shall be assessed, equalized, levied and collected by a county and a local taxing agency in the same manner as other ad

valorem taxes on tangible personal property are assessed, equalized, levied and collected.

Taxes and assessments on aircraft subject to this part shall be equalized in the same manner as other taxes and assessments of tangible personal property on the local roll.

Chapter 5. Collection

5421. As used in this chapter, "tax collector" means the official who is required to collect taxes on the unsecured roll in the county in which the aircraft is habitually based.

5422. The tax imposed pursuant to this part shall be collected by the tax collector.

5423. The tax collector shall collect the tax imposed pursuant to this part like any other county taxes on the unsecured roll.

Chapter 6. Distribution

5451. The revenue derived from any tax levied pursuant to this part shall be distributed as prescribed in this chapter.

5452. If the aircraft are habitually based in a city and any school districts, the proceeds shall be distributed one-third to the city, one-third to the school districts, and one-third to the county.

5453. If the aircraft are habitually based outside of a city, but in any school districts, the proceeds shall be distributed one-half to the school districts and one-half to the county.

5454. If the aircraft are habitually based in an elementary school district and a high school district, the proceeds allotted to school districts shall be divided equally between the elementary school district and the high school district.

5455. It is the purpose of this chapter to divide the proceeds allotted to school districts equally between districts supporting elementary schools and districts supporting high schools, excluding all other educational districts.

5456. The details of the method of distribution shall be supplied by the county auditor, shall be approved by the board of supervisors, and shall fairly carry out the purpose of this chapter.